

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. _____

77-594

RICHARD (DICK) STONE,

Petitioner,

vs.

EXPORT-IMPORT BANK OF THE UNITED
STATES, a United States
agency, and

WILLIAM J. CASEY, President and
Chairman of the Export-Import
Bank of the United States,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. _____

RICHARD (DICK) STONE,
Petitioner,

vs.

EXPORT-IMPORT BANK OF THE UNITED
STATES, a United States agency,
et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the
United States:

Senator Richard Stone (Florida), the petitioner
herein, prays that a writ of certiorari issue to
review the judgment of the United States Court of
Appeals for the Fifth Circuit, entered in this
matter on May 13, 1977.

OPINIONS BELOW

The May 13, 1977, opinion of the Court of
Appeals, whose judgment is herein sought to be
reviewed, is reported at 552 F.2d 132 and is
reprinted in the Appendix to this Petition at

pp. 4-16. The June 23, 1977, order of the Court of Appeals denying this petitioner's rehearing request is reported at 555 F.2d 1391 and is reprinted in the Appendix at p. 17. The prior unreported opinion of the United States District Court for the Northern District of Florida is reprinted in the Appendix at pp. 1-3.

JURISDICTION

The judgment of the Court of Appeals was entered May 13, 1977. A timely-filed petition for rehearing was denied by the Court of Appeals under date of June 23, 1977, and entered the same day. Jurisdiction of this Court is invoked pursuant to 28 USC §§1254(1), 2101(c).

QUESTION PRESENTED

Whether in enacting the Freedom of Information Act's fourth exemption for commercial or financial information obtained from a person and privileged or confidential, the Congress intended to protect from disclosure credit or loan agreements executed between Eximbank and foreign governmental agencies.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 USC §552, and the Administrative Procedure Act, 5 USC §551, are set forth verbatim in the Appendix hereto at pp. 18-26. This case involves FOIA's fourth exemption, 5 USC §552(b)(4), which exempts from disclosure

"trade secrets and commercial or financial information obtained from a person and privileged or confidential."

As used in the Act and defined at 5 USC §551(2)

" 'person' includes an individual, partnership, corporation, association, or public or private organization other than an agency."

As used in the Act and defined at 5 USC §551(1)

" 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; or (H) functions conferred

by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix [see 22 USC §§2456(a), 2457]."

STATEMENT OF THE CASE

The Complaint in this case was filed by Senator Richard Stone (Florida) on August 22, 1974, in the United States District Court for the Northern District of Florida, invoking the District Court's jurisdiction under FOIA ^{1/} in order to secure disclosure of the complete terms of a \$180 million credit agreement executed on May 21, 1974, by the respondent, Export-Import Bank, also called Eximbank, and its Russian counterpart, the Bank for Foreign Trade, relating to the furnishing by American business firms of technical services, phosphates, and equipment including tank cars and dual-purpose ships, for the construction in the U.S.S.R. of a fertilizer manufacturing complex and 1200 mile 20" pipeline. ^{2/} After suit was

1. At the time suit was filed, the jurisdictional provision was contained at 5 USC § 552(a)(3) but, following subsequent amendments, is now contained at 5 USC § 552(a)(4)(B).

2. All fact matters recited in this petition are reported in the Court of Appeals judgment under review (Appendix at pp. 4-16). Additional

filed, the developing record illuminated the fact that the May 21, 1974, agreement was actually a consolidation of two independently-negotiated loans consisting of (1) a \$180 million credit agreement between Eximbank and its Russian counterpart, and (2) an additional \$180 million credit agreement between the Soviet's Bank for Foreign Trade and a private consortium of United States commercial banks headed by the Bank of America National Trust and Savings Association. Senator Stone did not then and does not now seek disclosure of any privileged matter relating to the private lenders' credit.

The parties squared off in the District Court, via Eximbank's motion for summary judgment and

2. (cont'd) enlightenment as to particulars not mentioned here'in, concerning the number of tank cars and ships, pipe capacities and dimensions, asserted purposes as stated by Dr. Armand Hammer of Occidental Petroleum Corp., and other details, may be found in the transcript of testimony of April 26, 1974, before the Committee on Banking, Housing and Urban Affairs, Subcommittee on International Finance, U.S. Senate, the Honorable Adlai E. Stevenson III, Subcommittee Chairman, presiding, entitled Role of the Export-Import Bank and Export Controls in U.S. International Economic Policy.

Senator Stone's motion for in camera examination, and on April 21, 1975, the District Court entered its order holding as a matter of law, but without analysis, that the entire agreement "is information that is commercial or financial, was obtained from a person and is privileged and confidential" within FOIA's fourth exemption from disclosure (Appendix at p. 2). Senator Stone then timely filed a notice of appeal, but the Court of Appeals affirmed the District Court on the proffered basis that the Bank for Foreign Trade is a "person" and that the 1974 credit agreement contains "privileged or confidential" information, within the meaning of the fourth exemption (Appendix at p. 16). It is this Court of Appeals judgment, of May 13, 1977, which Senator Stone now brings before the Court.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Settle An Important Question Of Federal Law.

This is the first case of its kind in which FOIA's fourth exemption has been judicially applied to exempt public-sector or government-to-government transactions. Hitherto, all litigation specifically

pertaining to such exemption has been concerned with private-sector, primarily business, activities. The issue involved is strictly one of law only, requiring a statutory construction. There is no precedent.

Over the years since its enactment in 1966, FOIA has received much judicial attention, and always this Court has painted the Act's function in broadly-conceived language. Thus the Act's

"ultimate purpose [is] to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." Renegotiation Board v. Bannerkraft Clothing Co., 415 U.S. 1, 17, 39 L.Ed.2d 123, 94 S.Ct. 1028 (1974).

In order to provide maximum access to official information, FOIA's nine exemptions "are specifically made exclusive", Environmental Protection Agency v. Mink, 410 U.S. 73, 79, 35 L.Ed.2d 119, 93 S.Ct. 827 (1973). A particularly expansive reading of the Act was given recently in Department of the Air Force v. Rose, 425 U.S. 352, 361, 48 L.Ed.2d 11, 96 S.Ct. 1592 (1976), where the Court emphasized, "these limited exemptions do not obscure the basic policy that

disclosure, not secrecy, is the dominant objective of the Act." Accordingly, those exemptions "must be narrowly construed." Ibid. It is the fact of FOIA's importance itself, and the deviation by the Court of Appeals from this narrow-construction philosophy, which prompts Senator Stone to invoke the Court's certiorari jurisdiction.

The judicial opinions are today uniform in their view that the fourth exemption only secrets away information that is (a) "commercial or financial," (b) obtained from a "person," and (c) "privileged or confidential;" all three conditions must be satisfied before exemption can occur. See National Parks and Conservation Assoc. (I) v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974); Continental Oil Co. v F.P.C., 519 F.2d 31, 35 (5th Cir. 1975). Senator Stone has conceded throughout the course of his suit that the 1974 credit agreement contains commercial or financial information, but at the same time has continuously challenged the asserted presence of the other two statutory prerequisites for exemption status. The Court of Appeals decision, specifically finding that

presence as to both prerequisites, is an erroneous and somewhat shallow analysis of the Congressional intent underlying what everyone acknowledges to be a critically important federal law; such decision contravenes the narrow-construction philosophy requiring "full agency disclosure unless the information requested is clearly exempt under the statute." Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1134 (4th Cir. 1977).

The phrasing of the fourth exemption itself is too broad and unrefined to be of any help in discerning its parameters, particularly on the question of whether the Congress contemplated the exemption's applicability to Eximbank or other agency transactions with foreign governments. In this regard, Professor Kenneth Culp Davis has noted that the Act "is difficult to interpret and in some respects . . . is badly drafted." See Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. 761 (1967).

Nor do those legislative committee reports, pertinent to the exemption, shed any light favorable to Eximbank secrecy. One hurdle is that the reports are sometimes inconsistent and inaccurate, a problem

caused in part by the fact that the House committee copied most of the Senate report, which in turn was based on an unaltered earlier Senate report concerning a previous and differently-worded draft of the proposed exemption. See Davis, Administrative Law Treatise §3A.19 (1970 Supp.). To the extent of differences between them, the Senate version is generally accepted as the more accurate of the two reports. See Getman v. NLRB, 146 U.S.App.D.C. 209, 450 F.2d 670, 673 (1971); Benson v General Services Admin., 289 F.Supp. 590, 595 (W.D. Wash. 1968).

The Senate Report provides,

"This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically, it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan." See S.Rep. No. 813, 89th Cong., 2d Sess. at p. 9 (1965).

Read in a light most favorable to bringing Eximbank transactions with foreign governments under the exemption, the Senate Report is ambiguous in its expressed intent to exempt financial data "submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan," since such statement merely begs the question of whether the contemplated "applicant" or "borrower" must come from the private-sector or whether the borrower may include foreign governmental agencies as well. If there is any answer in the report, it is that "the examples of exempt records in both the Senate and the House Reports all indicate private sources of information." Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 Tex.L.Rev. 1261, 1271 (1970). See also 9 Akron L.Rev. 673, 678 (1976), A Review of the Fourth Exemption of the Freedom of Information Act, in which the author concludes that "the coverage of Exemption 4 is limited to the commercial or industrial sector and more specifically to profit-making enterprises or persons involved in the production or marketing of a

product or service."

Perhaps the legislative hearings, which gave rise to the reports, provide an answer to the question presented. In this regard, Petitioner conscientiously examined every page of the hearing transcripts, including their appendices. See Hearings on S.1160, 89th Cong., 2d Sess. (1965); Hearings on H.R. 5012, 89th Cong., 1st Sess. (1965). Again, all contemplated sources of information, apparently intended for exemption status, were strictly private-sector. Significantly, Eximbank did not participate in those hearings, furnished the committees with no written statement for inclusion in the appendices, and was nowhere mentioned. These findings by Senator Stone are corroborated in National Parks I, supra, in which the court there similarly delved into and analyzed much of the Congressional record underlying the fourth exemption. The National Parks I court found references in that record to legislative concern with preserving "the ground rules of American business", and protecting the confidentiality of such matters as "Small Business Administration loan

applications" submitted by businessmen, "financial, economic and technical information" obtained by the Rural Electrification Administration from applicants under its loan program, information sources "relied upon by the Bureau of Labor Statistics," and private business information "volunteered by employers, merchants, manufacturers, carriers, exporters and any other business men and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters." See National Parks I, supra at 768-769.

Thus, it would seem that the most charitable observation to be made regarding the subject of exempting information submitted to Eximbank by foreign governmental agencies is that the Congress never considered it; the matter of subsuming strictly governmental transactions under the fourth exemption never surfaced. This observation is most germane to the question presented since, if more than lip-service is paid to the narrow-construction philosophy inherent in FOIA's exemptions, disclosure of the May 21, 1974,

Eximbank credit to the Bank for Foreign Trade would seem mandatory.

The Court of Appeals decision now under review does not attempt to explore the legislative reports or other legislative background, except to briefly note that, via the device of a mere letter directed to but not otherwise discussed by the Senate or House committees, concerning the Act generally and not pertaining to any particular exemption, the Congress assertedly was "given notice by the Comptroller General that use of the word 'person' in the Freedom of Information Act would bestow rights under the Act on non-Americans" (Appendix at p. 15). The Court of Appeals principally bottoms its holding in this case on a cold application of the general statutory definition of "person", defined at 5 USC §551(2) as including any individual or entity "other than an agency", and of the term "agency", defined at 5 USC §551(1) as including only a United States governmental "authority", from which definitions the Court of Appeals then somewhat boldly extrapolates to the context of the fourth exemption and concludes, ergo,

that the fourth exemption's "person" includes foreign governmental agencies; the Court of Appeals never examines the legislative history underlying that exemption to determine the validity of its judicial logic. And of the two cases cited by the Court of Appeals, in support of its conclusion, the decision in Constructores Civiles de Centroamerica, S.A. v. Hannah, 148 U.S.App.D.C. 159, 459 F.2d 1183 (1972) did not pertain to FOIA in any way whatsoever, while the decision in Neal-Cooper Grain Co. v. Kissinger, 385 F.Supp. 769 (D.D.C. 1974) simply held that the Mexican government could qualify as a "person" for purposes of compelling disclosure of a document under the provisions of 5 USC §552(a)(3).

CONCLUSION

Senator Stone submits, given a case of this magnitude, that some exploration of the legislative record underlying the fourth exemption is necessary to ascertain whether the Congress intended to permit or prohibit disclosure under FOIA of Eximbank transactions with foreign governmental agencies. Neither the Court of Appeals, nor any other judicial

body, has made such an inquiry. If made by this Court, that inquiry will in all likelihood turn up no evidence of any Congressional intent to secret away these government-to-government transactions, which by their very nature contain the sort of politically-valuable information which FOIA was designed to make available to the American electorate. Wherefore, petitioner respectfully prays that a writ of certiorari be granted to settle the question in a manner consistent with FOIA's inherent narrow-construction philosophy.

Respectfully submitted,

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94107

Michael Sierra
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Suite 802
Tampa, Florida 33602

COUNSEL OF RECORD FOR
PETITIONER

CERTIFICATE OF SERVICE BY MAIL

I, Thomas A. Capelle, counsel of record for Senator Richard (Dick) Stone, petitioner herein, hereby certify that on September 16, 1977, pursuant to Rule 33, Rules of Supreme Court, I served three copies of the foregoing petition for writ of certiorari, with attached appendix, on each of the parties herein as well as on the Solicitor General, by depositing such copies in the United States Post Office, San Francisco, California, with first class airmail postage prepaid, properly addressed, as follows:

Leonard Schaitman and Thomas G. Wilson,
Appellate Section, Civil Division, United
States Department of Justice, Washington,
D.C., 20530, Counsel of Record for
Respondent Export-Import Bank of the
United States;

Leonard Schaitman and Thomas G. Wilson,
Appellate Section, Civil Division, United
States Department of Justice, Washington,
D.C., 20530, Counsel of Record for
Respondent William J. Casey;

Solicitor General, Department of Justice,
Washington, D.C. 20530.

All parties required to be served have been served.

DATED this 16th day of September, 1977.

Thomas A. Capelle
301 Brannan Street
San Francisco, California 94107
Counsel of Record for Petitioner
17.

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD (DICK) STONE,
Petitioner,

vs.

No. _____

EXPORT-IMPORT BANK OF THE
UNITED STATES, etc., et al.

Defendants

APPENDIX TO PETITION
FOR CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RICHARD STONE,	*	
Plaintiff	*	
vs.	*	
	*	No.TCA 74-129
EXPORT-IMPORT BANK OF THE	*	
UNITED STATES, et al,	*	Filed 4-21-75
Defendants.	*	9:24 AM
		U.S.D.C., N.D.
		Florida

ORDER

The above-styled cause was heard on March 4, 1975, on defendants Export-Import Bank of the United States, et al, motion to dismiss for failure to state a claim or, in the alternative, for summary judgment, said motion having been filed on October 24, 1974. Also heard on March 4, 1975, was a motion by the plaintiff Richard Stone for in camera examination and detailed analysis, that motion having been filed on November 20, 1974. On October 23, 1974, the defendants filed a motion to dismiss for lack of proper service upon the defendants. However, proper service was subsequently effected thus rendering the October 23rd motion to dismiss moot.

Plaintiff brought this action under the Freedom of Information Act, 5 U.S.C. §552, seeking to require the defendants to make available to the plaintiff a loan agreement extending credit to the Bank for Foreign Trade of the U.S.S.R. to be used in financing the sale and acquisition in the United States of equipment, phosphates and services for export to the U.S.S.R. in connection with the construction of fertilizer manufacturing facilities. A consortium of private commercial banks headed by the Bank of America National Trust and Savings Association, appearing in this action as amicus curiae, also agreed to grant a loan to The Bank for Foreign Trade of the U.S.S.R., and that agreement was

consolidated with the Export-Import Bank's agreement.

On July 2, 1974, the plaintiff requested that the defendants make available to him the loan agreement, but this request was denied. Although defendants have not made available the loan agreement itself, they have provided the plaintiff with the basic terms and conditions of the agreement. Defendants assert that the loan agreement itself comes within a specific exemption of the Act, 5 U.S.C. §552(b)(4), which provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are not required to be made available.

The Court is of the opinion that plaintiff's complaint does state a cause of action and that defendants' motion to dismiss should be denied. However, the Court finds that the loan agreement entered into with The Bank for Foreign Trade of the U.S.S.R. and involving a consortium of commercial banks is information that is commercial or financial, was obtained from a person and is privileged and confidential. The Court is of the opinion that the loan agreement sought by the plaintiff does come within the exemption provided by Congress in Section 552(b)(4) of the Act. Accordingly, having considered all the pleadings on file, affidavits and arguments of counsel and having found that there are no genuine issues as to material facts, the Court is of the opinion that the defendants' motion for summary judgment should be granted. As to plaintiff's motion for an in camera examination or detailed analysis of the loan agreement, the Court feels that such an inspection is not necessary and that the motion should be denied.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That the defendants' motion to dismiss for failure to state a cause of action is DENIED.
2. That the plaintiff's motion for in camera examination and detailed analysis is DENIED.

3. That the defendants' motion for summary judgment is GRANTED.

DONE this the 17th day of April 1975.

Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

RICHARD (DICK) STONE,
Plaintiff-Appellant,

v.

EXPORT-IMPORT BANK OF THE
UNITED STATES, et al.,
Defendants-Appellees.

No. 75-2575

United States Court of Appeals
Fifth Circuit

May 13, 1977

Thomas A. Capelle, San Francisco, Cal.,
Michael Sierra, Tampa, Fla., for plaintiff-
Appellant.

Leonard Schaitman, Thomas G. Wilson, Civ.
Div., U.S. Dept. of Justice, Washington, D.C.,
for Export-Import Bk.

W. DeVier Pierson, Mark E. Greenwood, Washington,
D.C., for amicus curiae.

Appeal from the United States District Court
for the Northern District of Florida.

Before MORGAN and FAY, Circuit Judges, and
HUNTER,* District Judge.

LEWIS R. MORGAN, Circuit Judge:

The question in this case is whether the
Bank for Foreign Trade, an agency of the Soviet
Union, is a "person" within the meaning of the
fourth exemption of the Freedom of Information Act,
5 U.S.C. § 552(b)(4). We hold that it is.

* Senior District Judge of the Western District of
Louisiana, sitting by designation.

I. FACTS.

The Export-Import Bank of the United States, an independent federal agency, is a banking corporation that helps facilitate and finance exports and imports between the United States and other countries. See generally 12 U.S.C. § 635 et seq.; 12 C.F.R. § 402.1. Eximbank, as it is known, derives its funds primarily from the sale of debentures in the private market, and not from congressional appropriations. The Bank is managed by a five-member board of directors appointed by the President with advice and consent of the Senate.

In 1972 the Bank for Foreign Trade, an agency of the Soviet Union, approached Eximbank for help in financing the export from the United States of goods and services for use in the construction of an ammonia manufacturing facility in the Soviet Union. In June of 1973, after negotiations, Eximbank issued a preliminary commitment for credit of \$180 million to the Bank for Foreign Trade. At the same time, the Bank for Foreign Trade negotiated a separate agreement with a consortium of private lenders, headed by the Bank of America, for the extension of an additional \$180 million credit to be used for the construction project.

Late in the summer of 1973, during discussions between the Bank of America and Eximbank, concerning coordination of the two credits, Eximbank proposed that the two credits be consolidated into a single loan agreement among the Bank of America consortium, Eximbank, and the Bank for Foreign Trade.¹ The proposal was agree-

1. It is Eximbank's policy to share financing of particular export programs with private American commercial lenders. When it does so, it prefers that the loan agreements be consolidated, as here. Record at 19-20.

able to all parties, and on May 21, 1974, after some further negotiations, the three parties executed a consolidated final loan agreement.

On July 2, 1974, plaintiff Senator Richard (Dick) Stone, then a condidate for United States Senate from Florida, requested that Eximbank furnish him a copy of the loan agreement. William J. Casey, chairman of Eximbank, denied the request on the ground that the loan agreement was confidential and could not be disclosed without the consent of the other parties to the agreement.² Plaintiff sought such consent from the Bank for Foreign Trade, but it was refused. Eximbank did, however, provide plaintiff with copies of the resolution adopted by Eximbank's board of directors approving the loan, which sets forth its

2. Eximbank's Freedom of Information regulations specifically exempt its loan agreements from disclosure. 12 C.F.R. § 404.3(c)(4).

basic terms,³ and of the press release that

3. The resolution stated:

WHEREAS, the financing set forth below will facilitate exports and imports and the exchange of commodities between the United States and the Soviet Union:

NOW, THEREFORE, BE IT RESOLVED, that in order to enable Vneshtorgbank of the U.S.S.R. (the borrower) to assist Techmashimport and Promsyrioimport in financing the acquisition in the United States and exportation to the Soviet Union of equipment, related materials and services to be used for the construction of an ammonia manufacturing complex, storage and transportation facilities for ammonia and superphosphoric acid and related facilities, there is hereby authorized the establishment by Export-Import Bank of the United States (Eximbank) of a line of credit (the Eximbank Credit) in favor of the Borrower of not to exceed the lesser of US \$180,000,000 or 45% of the U.S. costs, subject to the following terms and conditions:

1. Commercial Loan. One or more lenders acceptable to Eximbank shall agree to lend US \$180,000,000 to the Borrower on terms and conditions satisfactory to Eximbank to assist the Borrower in financing the U.S. costs.

2. Repayment. The Borrower shall repay the aggregate of the advances under the Eximbank Credit and the Commercial Loan in 24 approximately equal semiannual installments beginning on May 20, 1979, of which the first 12 shall be applied to repayment of the Commercial Loan and the last 12 to repayment of the Eximbank Credit.

3. Interest. The Eximbank Credit shall bear interest at the rate of 6% per annum, payable semiannually.

4. Commitment Fee. The Borrower shall be charged a commitment fee of 1/2 of 1% per annum computed from 60 days after the adoption of this resolution, on the undisbursed amount of the Eximbank Credit from time to time outstanding.

5. Cash Payment. The borrower shall make a cash payment from non-U.S. sources of not less than 10% of the U.S. costs.

6. Supply Contracts. Eximbank shall be

Eximbank issued the day the loan agreement was executed.

3 (cont'd) furnished with copies of the contracts for the purchase of the items to be financed under the Eximbank Credit and the Commercial Loan.

7. Disbursement. The Eximbank Credit and the Commercial Loan shall be disbursed pari passu.

8. Guarantee. Due and punctual payment of all amounts owing by the Borrower to Eximbank shall be guaranteed unconditionally by the Government of the Union of Soviet Socialist Republics.

9. Availability. Advances shall not be made subsequent to December 31, 1978, except to the extent that a duly authorized officer of Eximbank may consent in writing.

10. Other Terms and Conditions. Such other terms and conditions as Eximbank may deem advisable.

RESOLVED FURTHER, That the President, First Vice President, a Director, the Executive Vice President, the General Counsel or a Senior Vice President be and he is hereby authorized to execute such agreement or agreements to take such other action as he may deem necessary or convenient to carry this resolution into effect;

RESOLVED FURTHER, that the Senior Vice President and Treasurer-Controller, the Deputy Treasurer, or an Assistant Treasurer be and he is hereby authorized to make disbursements from time to time in accordance with the terms of this resolution and any agreement or agreements executed pursuant hereto.

4. The press release stated:

U.S. EXPORT SALES OF \$400 MILLION PLUS ENERGY AND FERTILIZER BENEFITS PROMISED BY EXIMBANK CREDIT OF \$180 MILLION TO THE U.S.S.R.

William J. Casey, Chairman of Export-Import Bank of the United States, announced today that the Bank's Directors have authorized a credit of \$180 million to the Bank for Foreign Trade of the U.S.S.R. (Vneshtorgbank). This credit will not only assist in the export of \$400 million of U.S. goods, but also promises major additional benefits in saving natural gas and bringing needed fertilizer to the United States.

4 (cont'd)

Eximbank will be involved only in financing U.S. exports, but this transaction is part of a program between the Soviet Union and American companies under which superphosphoric acid, which the U.S. has in relative abundance, will be shipped to the Soviet Union and two nitrogen fertilizers (ammonia and urea) which are scarce here, plus potash, will come to the U.S. This nitrogen fertilizer will be made with Soviet natural gas.

To manufacture the needed fertilizer here would require a drain on U.S. natural gas reserves in an amount large enough to heat a million U.S. homes a year.

The ammonia and urea imported into the U.S. will have an energy content equivalent to 25.2 million barrels of crude oil per year. For every BTU (British Thermal Unit) of energy used for the phosphates exported, ammonia, urea and potash requiring at least 50 BTU's of energy will be imported by the United States.

Occidental Petroleum or its affiliates plan to invest more than a half billion dollars in the U.S. to construct ships and to expand production facilities to mine and process phosphate rock in Florida. It is estimated that this will create two to three thousand jobs during the construction period until 1979, and 2900 permanent jobs thereafter.

In addition to the sale of at least \$400 million in U.S. equipment and supplies, the project should provide substantial balance-of-trade advantages for the U.S. resulting from the trade of commodities. The transaction contemplates that the U.S. would acquire needed fertilizer from abroad not for cash but in return for exporting materials in ample supply here, thus avoiding a net drain on America's trade balance.

The materials purchased from American companies with the assistance of this financing will be used in the construction of ammonia plants, storage facilities, pumping stations, railroad tank cars and a 1200 mile pipeline in the U.S.S.R. Private financing in the amount of another \$180 million will be

Plaintiff thereupon filed suit against Eximbank and its president in federal district court under the Freedom of Information Act, 5 U.S.C. § 552, seeking to compel disclosure of the agreement. Eximbank filed a motion for summary judgment

4 (cont'd) provided by a consortium of U.S. commercial banks headed by Bank of America, without Eximbank's guarantee. The borrower will make a cash down payment of \$40 million, which is 10% of the balance of the U.S. costs.

Proceeds of the Eximbank and commercial bank credits will be applied against purchases from U.S. companies by Techmashimport and Promsyrioimport of the U.S.S.R. Some of the possible major suppliers include: Babcock and Wilcox Company, New York, N. Y., Bechtel Corporation, San Francisco, Cal., Chemical Construction Company, New York, N.Y., Chicago Bridge and Iron Company, Oakbrook, Ill., General Electric Company, New York, N.Y., Honeywell, Inc., Minneapolis, Minn., Ingersoll-Rand Company, Woodcliff Lake, N.J., Kaiser Steel Corporation, Oakland, Cal., Occidental Petroleum Corporation, Los Angeles, Cal., Union Carbide Corporation, New York, N.Y., Union Tank Car Company, Chicago, Ill., and Westinghouse Electric Company, Pittsburgh, Pa.

The ammonia and urea plants which will be located at Togliatti and Kuybyshev, and the pipeline which will extend from the plant sites to Odessa, are expected to be completed by December 1978. U.S. exports of superphosphoric acid are expected to commence sometime in 1978. U.S. imports of ammonia, urea and potash will begin at the same time.

The credits are to be repaid in 24 semi-annual installments beginning May 20, 1979, with Eximbank's direct credit of \$180 million to be repaid out of the last 12 installments. The Soviet bank will pay interest on outstanding balances at an annual rate of 6% which was the rate Eximbank charged on its loans when a Preliminary commitment was issued on this transaction last year. The blended interest rate of Eximbank's loan and the loans extended by the U.S. commercial banks to Vneshtorgbank will be, at present prime rate levels, approximately 7.8% per year. Repayment of Eximbank's credit is to be guaranteed by the government of the U.S.S.R.

together with an affidavit of its general counsel. The motion asserted that the loan agreement was protected from disclosure by the fourth exemption of the Act, 5 U.S.C. § 552(b)(4), which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Plaintiff, taking the position that any loan agreement between Eximbank and the Bank for Foreign Trade was not within this exemption, moved the district court to conduct an in camera examination of the consolidated loan agreement to determine whether the terms of the loan by Eximbank to the Bank for Foreign Trade could be separated from the terms of the loan by the Bank of America consortium to the Bank for Foreign Trade, and whether any material pertaining to the latter loan was not exempt from disclosure. The Bank of America filed an amicus memorandum opposing disclosure of any part of the consolidated loan agreement, together with an affidavit of its senior vice president in charge of lending to European borrowers.

After further briefing, and without the requested in camera examination, the district court granted Eximbank's motion for summary judgment, holding that the loan agreement was exempt from disclosure in its entirety. Plaintiff appeals.

II. DISCUSSION.

On this appeal, plaintiff does not seek disclosure of the terms of the loan by the Bank of America consortium to the Bank for Foreign Trade. Instead, he seeks disclosure only of that portion of the consolidated loan agreement that sets forth the terms of the loan by Eximbank to the Bank for Foreign Trade. Plaintiff concedes that this portion of the agreement contains "commercial or financial information" within the meaning of § 552(b)(4). Brief for Appellant at 10; Reply Brief for

Appellant at 4 n 9. His argument is that the Bank for Foreign Trade is not a "person" within the meaning of the Act, so that the commercial or financial information reflected in the loan agreement was not "obtained from a person."

The core of plaintiff's argument is that Congress' intent in enacting the fourth exemption was to protect only American citizens and businesses, and not citizens, businesses, or agencies of a foreign country. He points to no legislative history disclaiming an intention to protect non-Americans. Instead, he relies on the absence of legislative history expressly embracing such an intention. He also points to the fact that the Senate Committee substituted the word "person" for "public" in § 552(b)(4) when it reported out the bill that became the Freedom of Information Act. See S.Rep.No. 813, 89th Cong., 1st Sess. 2 (1965). He argues that the term "public" would not have included foreign nationals or entities and that the substitution of "person" was not intended to broaden the scope of the fourth exemption.⁵

5. In support of the latter argument, plaintiff cites S.Rep.No. 813, supra, at 2: "The words 'any person' were substituted for the words 'the public' in order to convey the idea that 'highly personal' information may be involved."

What all this overlooks is that the term "person" is defined for purposes of § 552 in § 551, a fact of which we must assume Congress was aware:

For the purpose of this subchapter --

* * *

(2) 'person' includes an individual, partnership, corporation, association, or public or private organization other than an agency;

"Agency" does not include an agency of a foreign government, § 551:

For the purpose of this subchapter --

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include [specified exemptions].

Nothing in this definition of "person" suggests an intention to limit its plain terms to American individuals and "public or private" organizations. The two courts that have touched upon the question have declined to hold that foreign citizens or entities are not "persons" within the purview of § 551(2). See Constructores Civiles de Centroamerica, S.A. (Conceica) v. Hannah, 148 U.S.App.D.C. 159, 459 F.2d 1183, 1190 & n. 4 (1972) ("[T]he Administrative Procedure Act uses the words 'any person' not 'any citizen'," citing 5 U.S.C. § 551(2)); Neal-Cooper Grain Co. v Kissinger, 382 F. Supp. 769, 776 (D.D.C. 1974) (holding Mexican government is a "person" within meaning of 5 U.S.C. §§ 551(2) and 552(a)(3)).

Moreover, it appears that Congress was, in fact, given notice by the Comptroller General that use of the word "person" in the Freedom of Information Act would bestow rights under the Act on non-Americans. See Hearings on S. 1160 et al. before the Subcomm. on Administrative Practice and

Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., at 376 (1965).⁶ Finally, in enacting the Privacy Act of 1974, 5 U.S.C. § 552a, Congress demonstrated its awareness of the breadth of the term "person" as defined in § 551(2) by using, instead, the term "individual," defined as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2); see S.Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974).⁷

In sum, we find no warrant for reading into either § 552(b)(4) or § 551(2) a limitation on the

6. In his letter to the subcommittee the Comptroller General stated:

[W]e believe the reference to 'any person' [in § 552(a)(3)] is too broad. This language would make it mandatory for an agency to open its records to subversives, aliens -- even enemy aliens, to claim hunters, and to others whose interests might be adverse to the Government. We think that the individuals being given access to Government records should, at least, be citizens of the United States. . . .

7. The Senate Report stated:

[The] term ['individual'] is used instead of the term 'person' throughout the bill in order to distinguish between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act. . . . This definition was also included to exempt [from] the coverage of the bill intelligence files and data banks devoted solely to foreign nationals or maintained by the State Department, the Central Intelligence Agency and other agencies for the purpose of dealing with nonresident aliens and people in other countries.

term "person" that Congress neither put there nor demonstrated any intention to put there. We hold that § 552(b)(4) is not limited to protecting information obtained only from American citizens or organizations, and therefore reject plaintiff's argument that information obtained from the Bank for Foreign Trade is not information obtained "from a person" within the meaning of § 552(b)(4). We therefore affirm the judgment of the district court.⁸

AFFIRMED

8. As an apparent afterthought, plaintiff also asserts that the loan agreement between Eximbank and the Bank for Foreign Trade is not "privileged or confidential" within the meaning of § 552(b)(4). See Brief for Appellant at 14-15; Reply Brief for Appellant at 2. This assertion, like his argument that the Bank for Foreign Trade is not a "person," is premised on a supposed legislative intent to protect only United States citizens and businesses in the Act's fourth exemption. See Brief for Appellant at 2. For the reasons stated above, we find no support for this assertion.

Plaintiff does not argue that a loan agreement negotiated between a borrower who is a "person" and a government lender -- as distinguished from data submitted by the borrower to the government lender in order to qualify for the loan -- is not "privileged or confidential" within the meaning of § 552(b)(4). See S.Rep.No. 813, *supra*, at 9 ("Specifically it [the fourth exemption] would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan."); H.R.Rep.No. 1497, 89th Cong., 2d Sess. 10 (1965) ("It [the fourth exemption] would include information customarily subject to the . . . lender-borrower privilege such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency."). We therefore intimate no opinion on that question.

555 F.2d 1391
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

June 23, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-2575 - RICHARD STONE vs. EXPORT-
IMPORT BANK OF THE UNITED
STATES, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauck
Deputy Clerk

cc: Mr. Thomas A. Capelle
Mr. Michael Sierra
Messrs. Leonard Schaitman
Thomas G. Wilson
Messrs. W. Devier Pierson
Mark E. Greenwold

Administrative Procedure Act, Title 5 U.S.C.:

SUBCHAPTER II --ADMINISTRATIVE PROCEDURE

551. Definitions. For the purpose of this subchapter [§§ 551-559 of this title] --

(1) "agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include (A) the Congress; (b) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government or the District of Columbia; or except as to the requirements of section 552 of this title (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix [see 22 USC §§ 2456(a), 2457];

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person; (B) withholding of relief; (C) imposition of penalty or fine; (D) destruction, taking, seizure, or withholding of property; (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (F) requirement, revocation, or suspension of a license; or (G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or (C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to

all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter. (As amended Sept. 13, 1976, P.L. 94-409, § 4(b), 90 Stat. 1247)

Freedom of Information Act, Title 5 U.S.C.

552. Public Information.--Agency rules, opinions, orders, records, and proceedings.--

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so

published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale.

To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if (1) it has been indexed and either made

available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within 30 days after service upon the defendant of

the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall (i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency

for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are --

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USC § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files

the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

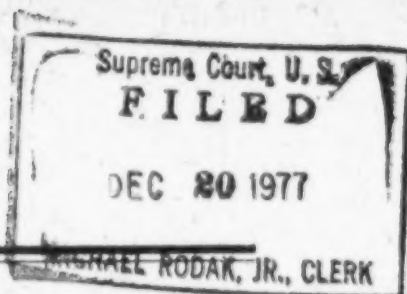
(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceeding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include (1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such

determination; (2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; (3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each; (4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken; (5) a copy of every rule made by such agency regarding this section; (6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and (7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title [5 USC § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. (As amended June 5, 1967, P.L. 90-23 §1, 81 Stat. 54; Nov. 21, 1974, P.L. 93-502, §§ 1-3, 88 Stat. 1561, 1563, 1564; Sept. 13, 1976, P.L. 94-409, §5(b), 90 Stat. 1247.)

No. 77-594



In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD STONE, PETITIONER

v.

EXPORT-IMPORT BANK OF THE UNITED STATES, ET AL.

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT***

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

**WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.***

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OCTOBER TERM, 1977

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EXPORT-IMPORT BANK OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
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THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

Petitioner, a United States Senator from Florida, contends that the Bank for Foreign Trade, an agency of the Soviet Government, is not a "person" within the meaning of the fourth exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(4), and that confidential commercial and financial information obtained from the Bank for Foreign Trade is therefore not exempt from disclosure under the Act.

In July 1974, petitioner requested that the Export-Import Bank of the United States ("Eximbank") provide him with a copy of a loan agreement between the Eximbank and the Bank for Foreign Trade of the Soviet Union that was designed to finance Soviet acquisition of

equipment, phosphates, and services in the United States for the construction of a fertilizer plant in the Soviet Union. Eximbank furnished petitioner with a copy of the resolution of its board approving the loan and of a press release, both of which set forth the basic terms of the agreement and disclosed that the agreement consolidated two separate loans, a \$180 million loan from Eximbank and a \$180 million loan from a consortium of private American banks. Eximbank, however, declined to provide petitioner with the agreement itself, on the ground that it contained confidential commercial and financial information (Pet. App. 6-10).

Plaintiff then filed suit, seeking disclosure of the agreement between Eximbank and the Bank for Foreign Trade, but not of the agreement between the Bank for Foreign Trade and the private American banks (Pet. 5; Pet. App. 12). The district court granted summary judgment for respondents on the ground that the agreement between Eximbank and the Bank for Foreign Trade was exempt from disclosure under 5 U.S.C. 552(b)(4), pertaining to "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (Pet. App. 1-3). The court of appeals affirmed (Pet. App. 4-16).

Petitioner's principal contention here, as in the courts below, is that an agency of a foreign government is not a "person" within the meaning of 5 U.S.C. 552(b)(4). That contention is foreclosed by the statutory definitions of "person" and "agency". 5 U.S.C. 551(2) provides (emphasis supplied):

"[P]erson" includes an individual, partnership, corporation, association, or *public or private organization other than an agency.*

In turn, 5 U.S.C. 551(1) provides in pertinent part: "'agency' means each authority of the Government of the United States * * *." An agency of a foreign government therefore falls within the statutory definition of "person", as the courts below held. See also *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 776 (D. D.C.). Cf. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F. 2d 1183, 1190 n. 14 (C.A. D.C.).

Petitioner's claim (Pet. 12-13) that, nothing in the legislative history of the Act indicates that Congress specifically considered agencies of foreign governments, even if true,¹ would neither demonstrate a legislative intent to exclude such agencies from the definition of "person" nor warrant overriding the clear statutory language. Moreover, petitioner offers no reason why Congress would have desired to treat confidential financial information obtained from agencies of foreign governments differently from similar information obtained from private or non-foreign public organizations.²

¹As the court of appeals noted (Pet. App. 14-15, n. 6) however, the legislative history of the Act shows that Congress was advised by the Comptroller General, who objected to the broad definition of "person" on the ground that, in his view, it would include "aliens—even enemy aliens * * *."

²The court of appeals also correctly rejected petitioner's claim (see Pet. 8) that the agreement, although containing commercial or financial information, was not privileged or confidential. The court stated (Pet. App. 16a, n. 8) that that argument "is premised on a supposed legislative intent to protect only United States citizens and businesses in the Act's fourth exemption," and thus is merely a restatement of petitioner's principal argument.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.